

Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct

**Hearing before the Subcommittee on Courts, Intellectual
Property, and the Internet**

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Testimony of Deeva V. Shah

Law Clerk to Hon. Stephen V. Wilson (2017-2018)

Law Clerk to Hon. Raymond C. Fisher (2018-2019)

Thank you, Chairman Johnson, Ranking Member Roby, and distinguished members of this Subcommittee for inviting me to testify today. My name is Deeva Shah, and I am a former law clerk to Judge Raymond Fisher, who sits on the U.S. Court of Appeals for the Ninth Circuit, and to Judge Stephen Wilson, a Judge of the U.S. District Court for the Central District of California. I am a trial attorney at Kecker, Van Nest & Peters LLP. I am here today with the support of the judges for whom I have clerked, my firm, and my friends and family.

I am a founding member of Law Clerks for Workplace Accountability, an organization dedicated to ensuring that the federal judiciary provides a safe workplace environment, free of harassment, for all employees, and assisting the judiciary in achieving that goal. For over two years, I, along with a group of current and former law clerks—including Jaime Santos, Kendall Turner, Claire Madill, and Olivia Weber—have urged the judiciary to take action to prevent and address workplace misconduct. We have worked collaboratively with the Federal Judiciary Workplace Conduct Working Group (“Working Group”), the Administrative Office of the United States Courts, and working groups formed by the multiple courts, including the Ninth Circuit and the D.C. Circuit. I personally have spoken at the National District Judges conference about these issues. Today, I look forward to discussing what I have learned over the past two years.

I applaud the judiciary’s actions to address workplace misconduct to this point. The changes that have been implemented to date and the attention paid to this important issue is most welcome. However, I believe the judiciary has not done enough to encourage and facilitate reporting of misconduct and today, I propose five changes that are necessary to effect long-term change and encourage employees to report misconduct. I believe that:

1. Reporting procedures for misconduct allegations should clearly define what consequences will be imposed if allegations are substantiated, how whistleblowers will be protected from retaliation, and how the judiciary will work to address any harm to the victim.
2. The judiciary should solicit information about employees’ past experiences with harassment and abusive behavior, rather than take an entirely forward-looking approach to studying this issue.
3. The Judicial Conduct and Disability Act should be amended to ensure that a judge cannot escape complaints or investigation by retiring or resigning.
4. The judiciary should create a national reporting system that requires district and circuit courts to provide anonymized reports of any formal or informal claims to the Office of Judicial Integrity. These anonymized reports should be made publicly available in aggregate.
5. Law clerks must have a seat at the decision-making table, not merely the option to offer input on an ad hoc basis.

I. Introduction

The day I accepted my offers to work as a clerk in the federal judiciary was one of the proudest days of my life. After years of dedication to pursuing my career in law, I felt like my hard work had paid off and I would proudly begin my career as a lawyer in a public service position.

Like me, those fortunate enough to be hired to work for federal judges are typically law students, for whom judges are more role models and idols than they are employers. Judicial chambers are unlike any other type of working environment. Judges are titans of the profession, people who have shaped the law and the profession as we know it. And like other law clerks, I began my clerkship with the belief that my judges would be teachers, would challenge my preconceptions, and become lifelong mentors. For me, and for many other law clerks, those beliefs became reality. Our clerkships were formative experiences that molded us as young lawyers. Unfortunately, that is not the case for all clerks. For those who experience harassment in the workplace, that ideal of what a judge *should* be and what they *can* be is devastating, personally and professionally. That power dynamic alone – with judges seeming larger-than-life - can make it feel near impossible to speak up against a life-tenured federal judge.

My colleagues and I began working on issues of harassment and misconduct within the federal judiciary in December 2017, when the Washington Post reported sexual harassment by a federal judge. We were concerned with the lack of clarity surrounding reporting procedures in the federal judiciary, a barrier exacerbated by the imbalance of power. We immediately drafted a letter offering modest suggestions to address workplace misconduct in the federal courts. We were uniquely positioned to offer guidance as current and former clerks, people who were likely to use--or not use--the reporting systems in place at the time. Over 850 former and current law clerks signed the letter.

Our suggestions included revising the Law Clerk Handbook and Judicial Codes of Conduct; improving training regarding harassment, confidentiality, and reporting procedures; developing a confidential national reporting system; and, forming a working group of judges, law clerks, and judiciary employees to study the way to address these issues.

In the months that followed, we spoke with dozens of law clerks and numerous judges. We received a mixed reception from the judiciary. Many judges, including the two for whom I clerked, were supportive of our efforts. Others opposed law clerk involvement in any reforms, including one judge going as far as to publicly call us the Spanish Inquisition on Twitter. Other judges dismissed outright the idea that there was a problem with harassment in the judiciary.

But our numerous conversations with law clerks suggested otherwise. Although harassment and abuse within the judiciary are not the rule, these experiences are also not uncommon. Law clerks

and externs from numerous federal courts shared with us that they had felt demeaned, belittled, or even humiliated during their clerkships or externships. People shared stories about being asked sexual questions unrelated to work, hearing their judges or other employees speak about female attorneys in objectifying terms, and being groped in public and in private. Almost every law clerk we spoke to knew of other clerks or employees who had been subjected to either harassment or abusive behavior in chambers. Although these experiences did not always involve abuse by judges, they involved mistreatment by staff or even other law clerks. The one theme that united these experiences was that the law clerks did not feel comfortable reporting these instances of misconduct, either because the reporting procedures were unclear, their confidentiality could not be guaranteed, or the fear of retaliation was too high.

When the Working Group was formed, we asked for a seat at the decision-making table. The Working Group declined our request, instead inviting us to speak with them on three separate occasions. During those meetings, we found the members of the Working Group were focused on the right issues: the power dynamics that create an initial hurdle to reporting, the lack of clear policies and procedures for reporting, the lack of transparency that undermines the public trust, and that abusive behaviors include misconduct outside of just sexual harassment. I want to acknowledge that the judiciary has moved more quickly than other institutions and has demonstrated a willingness to embrace change. Nevertheless, I do not believe the judiciary has adequately acknowledged its past failures, nor has it provided specific solutions to address the power dynamics and opaque procedures that form barriers to reporting.

We also know that workplace misconduct issues at federal institutions are not unique to the judiciary. Similar complaints from congressional staffers and workers regarding antiquated reporting policies could not ring more true than what we currently see in the judiciary. In 2018, through the staffers' actions and protest, many of you in this room successfully helped pass legislation reforms to the Congressional Accountability Act of 1995, improving the process to report allegations of sexual harassment and conduct. Many of these reforms are what bring me before you today – a need for better reporting policies in the judiciary.

II. The Judiciary's Current Changes Are A Step in the Right Direction

We have seen some encouraging signs of the judiciary's progress. These include revisions to the law clerk handbook and law clerk orientation program. The leadership has also changed its tone to reflect that ensuring a safe and respectful workplace is the responsibility of judges in each and every courthouse. Our group has had candid discussions with judges in various districts and circuits, and these conversations suggest that many judges are interested in a cultural change on this topic. These discussions are also crucial to ensure that women and people of color, who have long been underrepresented in clerkship hiring, do not face backlash for raising their concerns.

I appreciate the revisions to the code of conduct that clarify a judge's affirmative duty to promote civility and that prohibit harassment, bias, or prejudice. I acknowledge the changes to the Judicial Conduct and Disability Rules requiring judges to report or disclose misconduct. Nevertheless, although the judiciary has authorized systemic evaluations, I have not seen evidence of any such evaluations yet. As far as I am aware, there has been no investigation about the misconduct reported by the Washington Post in December of 2017, no interviews of potential victims, and no examination of how this behavior was able to continue for years. I find it difficult to have confidence that future evaluations will take place or be effective when one did not occur with respect to the misconduct revealed in 2017, despite the range of egregious misconduct that was reported.

The judiciary has also made some changes to its model Employment Dispute Resolution (EDR) plan. It has provided a clearer definition of "wrongful conduct" and provided some informal avenues for reporting. It has increased time to file formal claims (from 30 to 180 days) and worked to increase awareness of EDR rights and options. And I recognize that the new EDR plan allows employees to request interim relief while a claim is still pending. I fully support these changes. For law clerks, the early termination of a clerkship is a significant red flag on a resume. For other judiciary employees, the inability to continue working for their employer could put their livelihood at risk.

Finally, I commend the judiciary for creating the Office of Judicial Integrity to provide assistance regarding workplace conduct. I hope that a centralized office will ensure long-term change and accountability.

III. The Current System Is Not Sufficient to Effectuate Meaningful Change

Although the judiciary has taken some steps towards addressing misconduct, I believe that those steps have fallen short on delivering on their potential. It is unclear whether the Working Group intends to propose any further recommendations or whether the Judicial Conference plans to adopt any changes in the near future. The common refrain our organization hears from current clerks is that clerks still do not feel comfortable reporting abusive behavior or misconduct. More must be done to ensure meaningful change.

A. Reporting Procedures Should Clarify How Victims Will Be Protected

Although the judiciary has clarified its reporting procedures, the changes do not adequately explain what will happen after an employee invokes reporting avenues or how the judiciary will ensure that employees will not face retaliation.

As we have found, fear of retaliation is quite possibly the largest barrier to the reporting of harassment. No victim should have to live in fear. We appreciate that the judiciary has updated the Codes of Conduct and its Model EDR plan to note that misconduct includes retaliation. But aside from this policy change, the judiciary has failed to take significant action to actually protect employees from retaliation, to explain how it will determine whether retaliation has occurred, and, in instances where it learns of retaliation, what remedies are available for the victim and what disciplinary action may be taken against an offending judge or other employee. Simply prohibiting retaliation does not eradicate it, just as simply prohibiting harassment has not prevented it. The judiciary must develop concrete plans to address retaliation. Moreover, the Judicial Conduct and Disability Act should be amended to clarify what specific acts may constitute retaliation, what remedies are available, and how victims may take action in the face of such retaliation.

Separately, the judiciary should consider how it addresses the harms victims face as a result of misconduct. Harassment can be both personally and professionally damaging, and it is unclear whether the judiciary has engaged in enough fact-finding about employees' past experiences with harassment to determine what measures are necessary to address the harm from that harassment.¹ On a personal level, these measures may include counseling to address harm. On a professional level, clerks who report misconduct may face reputational harm and lose vital references and professional recommendations early on in their careers. The judiciary should consider methods of providing references for those who report misconduct and can no longer work with their employer.

B. The Judiciary Needs a Comprehensive, Retrospective Review

The Working Group and the Judicial Conference are both aware that the judiciary has failed to protect employees from harassment and abusive behaviors. That failure is ongoing. The Working Group was formed following public allegations of inappropriate behavior by a judge that spanned more than a decade. But the judiciary has not solicited feedback on how the misconduct was able to continue for so long, whether clerks attempted to report misconduct, and, if not, what barriers prevented them from doing so. I continue to believe that such a review is necessary for a thorough understanding of why the system failed. Such a review would also indicate that the judiciary actually encourages employees to report misconduct, instead of simply paying lip service to accountability.

Moreover, our efforts have been met with some hostility by members of the judiciary. We have been told repeatedly that significant reforms or cultural changes are not necessary because these problems are isolated. Although the Working Group has noted that “inappropriate conduct . . . is

¹ U.S. EEOC, *Select Task Force on the Study of Harassment in the Workplace* 19 (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

not limited to a few isolated incidents,” some judges continue to assert that there is no problem. Several members of our group have been confronted by members of the judiciary who have criticized us for not acting as a reporting avenue--suggesting that it is unethical for us to not disclose the accounts told to us by law clerks, who have not reported their experience for fear of retaliation. And by failing to fully reckon with what happened in the case of a high-profile judge who resigned in 2017, the judiciary has failed to demonstrate the accountability that it asks the public to trust will take place going forward. If judges do not acknowledge a problem, they will not make efforts to support proposed solutions or identify why reporting procedures have been underutilized. A survey or review of past misconduct, especially egregious misconduct, would also help the Office of Judicial Integrity be more effective in its mission.

C. The Judicial Conduct and Disability Act Should Be Amended to Require Investigation After Resignation and Allow Removal of Benefits

Currently, the Judicial Conduct and Disability Rules state that a “chief judge may conclude a complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible as to the subject judge.” In many cases before the Judicial Conduct and Disability Committee involving serious misconduct by a judge, the complaint has not been investigated because the accused judge has resigned or retired—with full benefits and pension and the ability to return to private practice. The Judicial Conduct and Disability Committee has stated that retirement makes further inquiry unnecessary.

I recommend amending the Judicial Conduct and Disability Act to require investigation even after the resignation of a judge, including institutional review and possible referral to the state bar if necessary. I also recommend amending the act to allow Judicial Conduct and Disability Committee to remove a judge’s benefits—including a lifetime pension—based on the results of such an investigation. Until now, the Judiciary has said that it lacks the power to remove those benefits without impeachment. I also recommend that the Act include specific procedures governing post-resignation review. Such institutional review should occur any time a judge resigns or retires pending an investigation, and if allegations are made against a judge who is deceased but served as a judge in the years before he passed away. Similarly, as the judiciary has previously acknowledged, “public confidence in the JC&D Act would benefit if the Judiciary . . . made decisions on those complaints more readily accessible.” Any amendment to the Act should clarify that such decisions should be made public.

D. The Judiciary Should Create an Anonymized National Reporting System

To study and address misconduct effectively, the Judicial Conference and the Administrative Office of the U.S. Courts must receive more information about misconduct allegations in each circuit and district court. Although the judiciary has recognized this, it has yet to implement any

specific reporting requirement that would cover all formal and informal complaints. Although district judges are required to inform their circuit about reports of wrongful conduct and how those reports were addressed, there is still no requirement that each circuit report that information to any national body. The Office of Judicial Integrity should require anonymized reporting of all formal and informal complaints. This would allow the judiciary to effectively identify and address trends and patterns of harassment and other abusive behaviors.

In the past, members of the judiciary have told our organization that these issues either do not exist, or, if they do, the judiciary cannot act because the issues are not being reported. A national reporting requirement would prevent plausible deniability about harassment at any level of the judiciary and would also encourage reporting by showing the judiciary's commitment to addressing misconduct.

A national reporting system should also allow clerks to report directly, instead of requiring clerks to first report within their district or circuit court. Many clerks fear retaliation or feel uncomfortable reporting within their own district or circuit. Currently, clerks are often directed to report to their circuit or district's chief judge, who may be friends with the accused judge or may even be the harasser himself. A national reporting system would address many such concerns. Although the Office of Judicial Integrity does seem to act in an advisory capacity by providing advice and assistance with reporting, my understanding is that it does not function as an independent reporting system. I encourage the judiciary to consider creating a robust national system operating within the Office of Judicial integrity that would both report and investigate misconduct while functioning independently of any circuit or district.

E. Law Clerks Need a Seat at the Decision-Making Table

The judiciary did not start addressing issues of harassment of its own accord. Law clerks forced the judiciary to make progress by coming forward with their experience, by urging the judiciary to take action, and by repeatedly providing specific reform recommendations. Despite these efforts, the federal Working Group and every circuit's working group have excluded clerks and most staff from the decision-making table.

Clerks provide a necessary, critical perspective in this process. The judiciary cannot replicate that perspective by soliciting occasional input. My colleagues and I have attempted to provide recommendations for reform to the best of our abilities. But we do not have access to the documents and data these groups have collected or could collect. We can only comment or provide input at limited junctures instead of throughout the entire process.

By denying law clerks a seat at the table, the working groups have deprived themselves of a necessary perspective on the power dynamics and other barriers that make reporting difficult.

No matter how well-intentioned judges may be, they cannot be expected to see their own blind spots in addressing these concerns. Law clerks may understand better than anyone the need for specificity and accountability in the working groups' recommendations. The existing policies have been ineffective and continue to remain ineffective because judges and court executives write them without valuable guidance and input from the very people who will use the system.

During our meetings with the Working Group, we requested the judiciary consider exit interviews and asked what exactly the planned exit interview surveys would say, who would send them out, what form they would take, and when they would be sent out. We were told, however, that we did not need to worry about those details. But those very details will determine whether employees feel comfortable reporting harassment and understand that they have an established, trusted venue in which to do so. Without details in the Report's recommendations, courts are likely to continue to have disparate processes and policies for handling harassment, and employees are likely to continue to feel unsure about their rights and remedies.

Finally, providing law clerks a seat at the table would increase public confidence in the judiciary's ability to address these issues in an effective manner. As current reports have indicated, offering platitudes and generalized language does not encourage reporting or inspire confidence in the judiciary's efforts. Judges hire law clerks to assist them in resolving difficult cases. These law clerks frequently graduate at the top of their classes, distinguishing themselves from their peers at the most elite law schools. Many law clerks will go on to other clerkships. And the law clerks who have attempted to report or have faced barriers to reporting have invaluable insight to offer about ongoing changes and improvements that may be necessary. History is likely to repeat itself if stakeholders, such as law clerks, continue to be excluded from the decision-making table.

F. Other Recommendations

I ask this committee to also consider other issues that affect the reporting of misconduct within the judiciary.

Reporting Time Limit

The current time limit to report misconduct under the Model EDR plan is 180 days from the date of the alleged violation. I recommend that the time limit be extended to at least one year following the violation, *i.e.*, the term of a typical clerkship. Often, it is not until a term law clerk completes her clerkship that she has time to reflect on any potential misconduct and benefits from the physical separation that reduces the fear of immediate retaliation for reporting misconduct. A year-long reporting period can better accommodate these concerns and would

thus likely encourage a higher level of reporting, especially once a clerk can find a post-clerkship job.

The Role of Law Schools

Law schools play a critical role in the clerkship and judicial extern hiring process. Law professors are themselves often former clerks, and many law clerks are hired based on their professors' relationships with judges. Law clerks and externs often reach out to their law schools for support and advice when they face challenges in their clerkships, including abusive chambers practices. Law school career services offices also commonly collect feedback from clerks and externs about their experiences working in the judiciary. Thus, law schools collectively possess more valuable information about harassment and abusive behaviors in chambers than perhaps any other group. Despite this, they have historically played no role in reporting the misconduct of which they have become aware.

My colleagues and I have spoken with groups of law students who have encouraged their schools to take action to help prevent harassment and abusive behaviors in chambers from flourishing. Thus far, their requests have largely been rebuffed. Most law schools have not demonstrated a willingness to address these issues, likely because they fear that reporting credible instances of judicial misconduct would adversely affect their relationship with judges and their students' clerkship prospects. This must change.

Although the Office of Judicial Integrity encourages reporting from law schools, it is unclear how or whether law schools are reporting such conduct. Finding a real solution to the problem of harassment within the judiciary will require ongoing, sustained efforts from the judiciary and the law schools that send their students to judicial chambers.

IV. Conclusion

Although the judiciary has taken steps and made some welcomed changes to encourage reporting of misconduct, I believe those changes are not yet sufficient to effectuate actual change. It is our collective obligation to provide law clerks with a safe work environment and give them fair and transparent methods for reporting misconduct when it happens.

I applaud the Subcommittee for your attention to this important issue, and I ask you to consider these recommendations to ensure that these long-term, systemic problems are addressed through greater transparency and accountability. Thank you very much for your time.